

several liability, a seller or telemarketer can be held liable if either engages directly, or substantially assists or facilitates the other, in any violation of this Rule.

9. Telemarketing. The definition of "telemarketing," in Section 310.2(u),⁴¹ engendered more comments by far than any other definition. Based on the comments submitted by law enforcement and industry representatives, the Commission proposes a revised definition of "telemarketing." The revised definition states:

Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

The revised definition of "telemarketing" follows more closely the statutory definition set forth by Congress in the Telemarketing Act.⁴² The Commission has carefully considered suggestions that the initially proposed definition exceeded the Commission's statutory authority and has determined that closer adherence to the statutory language is the more appropriate approach.⁴³ This change also limits the definition of

⁴¹ Initially proposed Rule Section 310.2(v).

⁴² 15 U.S.C. 6106(4).

⁴³ The Commission, however, does not adopt the view that the definition of "telemarketing" in the initially proposed Rule went beyond the Telemarketing Act. In enacting the Telemarketing Act, Congress clearly intended to cover purchases of tangible as well as intangible goods or services, including leases and licenses. House Report at 11; Senate Report at 8. In any "purchase" there is an exchange of consideration, in other words
(continued...)

"telemarketing" to telephone calls and excludes from coverage other "telephonic mediums." After considering many comments that objected to the Rule's coverage of on-line services, the Commission acknowledges that it does not have the necessary information available to it to support coverage of on-line services under the Rule.⁴⁴

The revised definition of "telemarketing" also eliminates specific language relating to coverage of inbound calls. Many commenters expressed concern that inclusion of such calls went beyond the Commission's statutory authority.⁴⁵ As will be discussed further in the discussion of Section 310.6, given the abundant, unambiguous legislative history on this point,⁴⁶ and the omission from the statute of any indication that inbound calls are not within its ambit, the Commission rejects this view. Other commenters⁴⁷ stated that including inbound calls in the proposed definition caused confusion about the applicability of the proposed general advertising exemption contained in Section 310.6 of the initially proposed Rule. Because the definition of "telemarketing" encompasses coverage of inbound calls under the Rule, it is no longer necessary to include such calls explicitly within the revised definition of "telemarketing." Furthermore, the inbound call exemption has been clarified in Section 310.6 to eliminate the confusion expressed in the comments. The revised proposed Rule's coverage, however, extends to inbound calls.

Many industry comments addressed the term "further solicitation" used in the part of the "telemarketing" definition that exempts from coverage solicitation of sales through the

⁴³(...continued)

a "payment." Because deceptive telemarketers could construe the term "purchase" to apply only to the acquisition of a "tangible" good or service, the Commission substituted the term "payment" for "purchase." The Commission intended to clarify that sales of intangible goods or services were included in the term "telemarketing," as they still are under the revised proposed Rule.

⁴⁴ Such media remain subject to the Commission's jurisdiction under the FTC Act, 15 U.S.C. 41 et seq. See, e.g., FTC v. Corzine, dba Chase Consulting, No. CIV-S-94-1146-DFL JFM (E.D. Cal. Dec. 1994).

⁴⁵ See, e.g., DSA at 6; NRF at 20-21.

⁴⁶ House Report at 2; Senate Report at 7-8.

⁴⁷ E.g., DMA at 17-18; MPA at 8-9.

mailing of a catalog.⁴⁸ Numerous industry commenters suggested that reputable catalog companies have substantially similar catalogs in the public domain that mirror each other but may also be targeted to a particular season, activity, or product. For example, a mail order clothing seller may have summer and spring catalogs that include many of the same products, but they are different catalogs nevertheless. Commenters suggested that offering a caller goods or products contained in a catalog substantially similar to the catalog that generated the call should not trigger Rule coverage for a catalog seller.⁴⁹ Counterbalancing this point is the Commission's concern that exemptions from coverage be narrowly drawn to discourage exploitation of a perceived loophole by unscrupulous telemarketers. The revised proposed Rule therefore is modified to accommodate legitimate industry's practice of regularly mailing seasonal and similar catalogs, at the same time limiting the exemption to those catalogs that are "substantially similar" to the catalog that generated the customer's call.

Several commenters also expressed uncertainty as to whether "telemarketing" included calls to schedule appointments for subsequent face-to-face sales presentations and calls to inform persons about upcoming store sales or promotions.⁵⁰ The Commission believes that the definition clearly reflects the intention to cover those telephone calls that result in the sale of goods or services over the telephone without any opportunity by the customer to examine the goods or services. Obviously, a face-to-face sales presentation provides such an opportunity and the notification of upcoming sales or promotions inviting a customer to come into a store or other in-person setting does not culminate in a telephone sale.

10. Telephone solicitation. The initially proposed Rule included a definition of the term "telephone solicitation." As noted in the NPR, the definition was "intended to include only outbound sales calls, i.e., telephone calls that are initiated by a telemarketer to a customer to induce payment for goods or services."⁵¹ Based on the comments received about other Sections of the initially proposed Rule that used the term "telephone solicitation," the intended coverage of only outbound sales calls was not clear.⁵² In order to clarify this point, the revised

⁴⁸ See, e.g., APAC at 9; NRF at 23-25; MPA at 10.

⁴⁹ E.g., NRF at 24.

⁵⁰ See, e.g., WFNNB at 1.

⁵¹ 60 FR at 8315.

⁵² See, e.g., MPA at 19; NRF at 35.

proposed Rule now defines the term "outbound telephone call" in Section 310.2(n) to mean "a telephone call initiated by a telemarketer to induce the purchase of goods or services," and uses it in every instance where the initially proposed Rule used the term "telephone solicitation."

11. Verifiable retail sales price. The initially proposed Rule defined the term "verifiable retail sales price."⁵³ The Commission has deleted all references to "verifiable retail sales price" in the revised proposed Rule. The Commission does not believe including a definition of "verifiable retail sales price" is necessary in this revised proposed Rule. Where appropriate, the Commission has used the term "value" in the Rule. The Commission intends that any represented value have a reasonable basis in fact.

Section 310.3 Deceptive Telemarketing Acts or Practices

1. Prohibited Deceptive Telemarketing Acts or Practices.

Revised Section 310.3(a) continues to require affirmative disclosures and prohibits misrepresenting material information. As in the initial version of the proposed Rule, Section 310.3(a)(1) requires affirmative disclosures of general categories of material information. Many industry commenters, however, expressed concern about the uncertain scope of the affirmative disclosure obligation embodied in Section 310.3(a)(1).⁵⁴ The Commission has carefully considered these concerns and revised the proposed Rule accordingly. Specifically, the initially proposed rule required disclosure of "the total costs, terms, and material restrictions, limitations, or conditions of receiving any goods or services." Revised Section 310.3(a)(1) now requires disclosure of "the total costs . . . [and] all material restrictions, limitations, or conditions to purchase, receive or use any goods or services that are the subject of the sales offer." This revision is intended to narrow and clarify the scope of the disclosure obligation. The initially proposed rule also specified that the disclosures required by Section 310.3(a)(1) be made "before payment is requested . . . and in the same manner and form as the payment request." In response to strong industry urging for greater flexibility in the manner and timing of essential disclosures,⁵⁵ the revised proposed rule specifies only that the disclosures be made "before a customer pays" and that they be made "in a clear

⁵³ Initially proposed Rule Section 310.2(x).

⁵⁴ See NIMA at 11; ACAR at 12; TR. at 292 (Monex), 296-97 (PMAA), 303-05 (ICTA).

⁵⁵ See PMAA at 80; OPC at 2-3; ADS at 1; MORA at 1.

and conspicuous manner." These disclosure may be made either orally or in writing. The determining factor for when a customer pays, regardless of whether by cash, check, credit card, demand draft, or otherwise, is when a customer sends funds by any means or provides credit card or bank account information to the seller or telemarketer to purchase goods or services. Additionally, Section 310.3(a)(1) no longer requires an affirmative disclosure of a seller's refund, cancellation, exchange, or repurchase policies, unless the seller or telemarketer chooses to make representations relating to such policies a part of the sales offer. If a seller or telemarketer chooses to make such policies a part of the sales offer, then the seller or telemarketer must disclose all the material aspects of the terms and conditions of such policies, orally or in writing, before a customer pays for the goods or services offered. Finally, a seller or telemarketer must disclose that no purchase is necessary to win if a prize promotion is offered in conjunction with a sales offer of goods or services.

Section 310.3(a)(2) continues to prohibit misrepresentations of several categories of material information. The information deemed material under Section 310.3(a)(2), is based on established case law and the Commission's deception policy statement. The Commission, however, has determined to drop the lengthy enumeration of specific prohibited misrepresentations contained in Sections 310.3(a)(2)(viii)-(xxiv) of the initially proposed Rule. These specific prohibited misrepresentations, each of which was based on allegations in complaints filed in recent years by the Commission under Section 13(b) of the FTC Act,³⁶ are no longer necessary because they are subsumed in the general prohibitions against misrepresentations set forth in Section 310.3(a)(2) of the revised proposed Rule. No inference should be drawn that these deletions in any way alter the Commission's view that the misrepresentations enumerated initially in proposed Sections 310.3(a)(2)(viii)-(xxiv) would violate the FTC Act as well as the revised proposed Rule. The Commission believes that this more concise regulatory approach effectuates Congress' legislative intent and addresses the concerns of many commenters, consumer groups,³⁷ law enforcement,³⁸ and industry³⁹ alike, who asserted that a general standard of deception was necessary either in addition to or instead of the enumerated acts or practices.

³⁶ 15 U.S.C. 53(b).

³⁷ See, e.g., AARP at 10.

³⁸ See, e.g., USPS at 4.

³⁹ See, e.g., APAC at 2; ATA at 5; DMA at 19; Monex at 8-

Sections 310.3(a)(2)(i)-(ii) prohibit misrepresenting information required to be disclosed under Section 310.3(a)(1). The scope of Sections 310.3(a)(2)(i)-(ii) has been delineated more precisely than their counterparts in the initially proposed Rule Sections 310.3(a)(2)(i)-(iii). Revised Sections 310.3(a)(2)(i)-(ii) now include the limiting phrases "to purchase, receive, or use" and "that are the subject of a sales offer." The same clarifying phrases have been added to revised Section 310.3(a)(2)(iii), which specifies that misrepresenting "any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of the sales offer" violates this Rule. Commission case law and policy are clear that such information is material to a person's choice of or conduct regarding the purchase of goods or services. Similarly, representations as to a seller's refund, cancellation, exchange, or repurchase policies are material to a person's purchase decision. Section 310.3(a)(2)(iv) (identical to Section 310.3(a)(2)(v) of the initially proposed Rule) therefore prohibits misrepresenting the latter category of information.

Section 310.3(a)(2)(v) of the revised proposed Rule prohibits misrepresenting "any material aspect of a prize promotion, including but not limited to the odds of winning, the nature or value of a prize, or that payment is required to receive a prize." The Commission has enumerated specific examples of material aspects of a prize promotion based on misrepresentations that the Commission has alleged in complaints filed under Section 13(b) of the FTC Act. The Commission believes that treating prize promotions as a separate general category is warranted given the great number of deceptive prize promotions and the distinct characteristics associated with such promotions.⁶⁰ Moreover, the legislative history clearly shows that Congress specifically intended that the Rule cover prizes or awards.⁶¹ Because there are certain aspects of a prize promotion that could be construed to be outside the scope of provisions narrowly limited to "the subject of a sales offer," the Commission believes that it is necessary to include revised Section 310.3(a)(2)(v). The prohibitions against prize promotion misrepresentations under Section 310.3(a)(2)(v) are in addition to the other prohibitions set forth in Section 310.3(a)(2).

Similarly, Section 310.3(a)(2)(vi) prohibits misrepresenting material aspects of an investment opportunity. The legislative history reflects Congress' recognition that deceptive investment opportunities account for a considerable percentage of deceptive

⁶⁰ Almost 32% of the 141 telemarketing cases brought by the Commission since 1991 related to deceptive prize promotions.

⁶¹ See Senate Report at 8.

telemarketing.⁶² Moreover, since 1991, deceptive investment scams account for approximately 43% of the Commission's telemarketing cases. The amount at risk for a consumer is generally far greater in investment scams than in deceptive schemes involving other types of consumer goods or services. Thus, investment opportunities are an area of heightened concern for consumers and the Commission. The revised proposed rule includes Section 310.3(a)(2)(vi), prohibiting misrepresentation of specified aspects of investment opportunities. This provision is included to obviate any possible construction that might exclude investment opportunities from the scope of Sections 310.3(a)(2)(i)-(iii). These general initial provisions are designed to embrace a limitless range of goods or services but are narrowly drawn to prohibit misrepresentations centered on purchase, receipt or use, or upon "performance, efficacy, nature, or central characteristics," which are unlike investment-specific attributes such as risk, liquidity, earnings potential, or profitability. The prohibitions on misrepresentations under Section 310.3(a)(2)(vi) are in addition to, not in lieu of, other provisions under Section 310.3(a)(2).

Finally, the Commission has included Section 310.3(a)(2)(vii) that prohibits misrepresenting "a seller's or telemarketer's affiliation with, or endorsement by, any government or third-party organization." The Commission believes that this Section is necessary based on its own experience in law enforcement actions against deceptive telemarketers as well as the information state law enforcement agencies provided. Based on the Commission's enforcement experience, deceptive telemarketers bolster their credibility by misrepresenting that they are endorsed by or affiliated with charitable, police, civic, or similar organizations. A separate category is required because these types of misrepresentations, again, could be construed as outside the apparent scope of Sections 310.3(a)(2)(i)-(iii). However, Section 310.3(a)(2)(vii) is in addition to, not in lieu of, other provisions under Section 310.3(a)(2).

The Commission has deleted Section 310.3(a)(3) relating to business ventures. The Commission, as stated in Section 310.2, believes it is more appropriate to consider business ventures in the context of the Commission's recently-initiated Franchise Rule review. This should not be construed to mean, however, that if a business venture is sold through telemarketing and does not meet the coverage requirements under the Franchise Rule as currently in effect, it is exempt under this Rule. Such a "business venture" will still be deemed to be covered under this Rule as a good or service and be subject to the Rule's disclosure requirements and prohibitions.

⁶² See Senate Report at 8.

Revised Section 310.3(a)(3) generally prohibits "making a false or misleading statement to induce any person to pay for goods or services." This general provision subsumes Sections 310.3(a)(4) and (5) of the initially proposed Rule. Former Section 310.3(a)(4) required written authorization before taking any funds from a consumer's checking, savings, or similar account. Former Section 310.3(a)(5) required express authorization before "obtaining any amount of money from a person through any means." The revised Section, through more economical means, reflects how deceptive sellers and telemarketers gain access to consumers' money through false and misleading statements regardless of the payment system used. While addressing those deceptive practices, revised Section 310.3(a)(3) also avoids unduly burdening legitimate industry's nondeceptive use of various payment systems.⁶³

2. Assisting and Facilitating

Section 310.3(b) received substantial attention from commenters. Law enforcement and consumer groups generally were favorable but some suggested including a more general prohibition against assisting and facilitating.⁶⁴ Industry comments raised concerns that the knowledge standard in the initially proposed Rule was too vague or harsh and that the liability for assisting and facilitating should attach only where the assistance or support is directly linked and material to the Rule violation.⁶⁵ Some industry commenters suggested that the Rule include exemptions for certain practices and that this Section not impose any affirmative duties on third parties.⁶⁶ All commenters raised valid and important issues that the Commission has considered.

To address concerns that the "knew or should have known" standard initially proposed may have swept too broadly and exposed those only casually associated with deceptive telemarketing to liability as assistors or facilitators, the Commission now proposes the "actual knowledge or conscious avoidance" standard advanced by a number of participants in the

⁶³ Several commenters and workshop participants provided information tending to refute the proposition that demand drafts are characteristic solely of deceptive telemarketers. See, e.g., NAPA; Autoscribe; Olan.

⁶⁴ See generally NCL at 8; USPS at 7-8.

⁶⁵ See, e.g., WFNNB at 2; MPA at 11-13; ATA at 6; DMA at 22-24; NRF at 29; Monex at 11-13.

⁶⁶ See generally PMAA; ADS; LCS; DMA; ISA.

public workshop.⁶⁷ This standard is similar to the knowledge standard applicable in actions under Section 13(b) of the FTC Act governing individual liability to pay restitution to consumers for injury resulting from law violations of a corporation controlled by the individual⁶⁸ -- a type of vicarious liability somewhat analogous to assistor and facilitator liability. The Commission intends that this revision delineate the scope of assistor and facilitator liability more clearly and more narrowly than did the "know or should have known" standard.

The Commission also believes it appropriate to specify that there be some connection between the substantial assistance provided to a deceptive telemarketer and resulting violations of core provisions of the revised proposed Rule. Revised proposed Section 310.3(b) therefore requires that there be substantial assistance related to the commission or furtherance of a core rule violation. The provision now reads as follows:

It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a) or (c) or 310.4 of this Rule and such substantial assistance is related to the commission or furtherance of that act or practice.

Section 310.3(b)(2) of the initially proposed Rule set forth five specific examples of conduct deemed to meet the "substantial assistance" prong of the two-prong test for "assisting and facilitating" set forth in Section 310.3(b)(1), which, when coupled with knowledge required by the second prong, would constitute a violation of this Rule. The prevailing view among

⁶⁷ See e.g., Tr. at 372-73 (Monex); 382-85 (DMA).

⁶⁸ Under these cases, the knowledge requirement is well-established and can be fulfilled by showing either actual knowledge, reckless indifference to the truth or falsity of the representation, or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. E.g., FTC v. American Standard Credit Systems, Inc., CV 93-2623 LGB (JRx) (C.D. Cal. Aug. 15, 1994); FTC v. Amy Travel Serv., 875 F.2d 564, 573-74 (7th Cir.), cert. denied, 493 U.S. 954 (1989); FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1292 (D. Minn 1985); FTC v. International Diamond Corp., 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69,707 (N.D. Cal. 1983). This knowledge standard has not imposed any unduly onerous problems of proof on the Commission in its Section 13(b) telemarketing fraud cases and has not impeded the Commission's ability to obtain restitution from individual defendants.

industry commenters was that this list of examples would be interpreted as condemning a range of commercial activities that, in and of themselves, are not injurious to consumers or unlawful.⁶⁹ The resulting chilling effect could result in unnecessary costs to industry, which, of course, would ultimately be borne by consumers. This detrimental effect, combined with the potential for the Section to be construed as limiting the scope of assisting and facilitating to only the listed activities, and thus hindering effective law enforcement efforts, outweighed any benefits such intended guidance could likely provide. The Commission has eliminated examples from the prohibition, but still considers the acts or practices enumerated in former Section 310.3(b)(2) to be illustrative of those that provide substantial assistance to Rule violators when coupled with knowledge and a relationship to a specified Rule violation. Acts of substantial assistance that could meet the Section 310.3(b) liability standard include: providing lists of contacts to a seller or telemarketer that identify persons over the age of 55, persons who have bad credit histories, or persons who have been victimized previously by deceptive telemarketing or direct sales; providing any certificate or coupon which may later be exchanged for travel-related services; providing any script, advertising, brochure, promotional material, or direct marketing piece used in telemarketing; or providing an appraisal or valuation of a good or service sold through telemarketing when such an appraisal or valuation has no reasonable basis in fact or cannot be substantiated at the time it is rendered.

3. Credit Card Laundering.

The Commission received very few comments that offered changes or that were critical of Section 310.3(c), which pertains to credit card laundering. Comments that did address this Section suggested that agents, licensees, and independent contractors and subcontractors be included under the definition of "merchant."⁷⁰ Visa and MasterCard stated that they believed this Section to be "well designed to attack a critical link in telemarketing fraud," but proposed adding language that would not prohibit access to the credit card system if the credit card system permits such access through means other than a written merchant agreement.⁷¹

The Commission believes that the distinction between "launderers" and others who exploit the credit card system, and "merchants" and others who make legitimate use of such systems,

⁶⁹ See generally DMA; PMAA.

⁷⁰ E.g., DMA at 24; NRF at 30.

⁷¹ See MasterCard at 10-11.

rests on whether the operator of the system has given permission for such access. For example, some merchants have the permission of their credit card system operator to permit lessees to deposit their sales transactions through the merchant's account. On the other hand, the hallmark of prohibited laundering is providing access to a merchant account to an entity not authorized by the system operator to have such access. Based on the foregoing, the Commission does not believe it is wise to broaden the definition of "merchant." An underlying purpose of this Section is to delineate clearly, in accordance with legitimate industry standards, those persons who are deemed to properly have access to the credit card system. However, the comments of Visa and MasterCard point out a way that the provision can be modified to allow for situations where a credit card system expressly permits access to the applicable system, other than through a written merchant agreement. Because such a modification will give rise to no foreseeable problems of proof to law enforcement efforts, the Commission concludes that this modification is appropriate.⁷² The Commission therefore has determined that the modifications needed to Section 310.3(c) are to add language to the preamble to state that "except where expressly permitted by the applicable credit card system" and to add similar language to the end of Section 310.3(c)(3).

Section 310.4 Abusive Telemarketing Acts or Practices

1. Abusive Conduct Generally.

Section 310.4(a) of the initially proposed Rule set forth eight different prohibited abusive telemarketing acts or practices. The revised proposed Rule deletes four of those provisions, and amends the other four prohibited practices. Each of these practices will be discussed in turn.

⁷² NCL requested in its comments pertaining to credit card laundering that the Commission consider protections relating to the use of "credit card checks" and "credit card cash advances." See NCL at 31. NCL expressed concern that credit card protections contemplated in Section 310.3(c) and the Fair Credit Billing Act ["FCBA"], 15 U.S.C. 1666, do not extend to those alternative credit methods. There is no indication in the legislative history or the Telemarketing Act that Congress intended to include under credit card laundering the alternative credit methods NCL describes. Moreover, the Commission does not have the authority under the Act to expand or affect the scope of the FCBA. The Commission believes, however, that transactions effected through the use of the alternative credit methods NCL described are adequately protected under the FCBA dispute procedures. Id.

(a) Threats, intimidation, or the use of profane or obscene language. The initially proposed Rule prohibited threats or intimidation in Section 310.4(a)(1). The Commission believes such acts are clearly abusive in telemarketing transactions, and this prohibition remains in the revised proposed Rule. Commenters noted that threats are a means of perpetrating a fraud on vulnerable victims, and that many older people can be particularly vulnerable to threats and intimidation.⁷³ Other commenters expressed the view that the terms "threats" and "intimidation" are vague and need to be defined.⁷⁴ The Commission does not believe further definition of these terms is necessary in the text of the Rule; as drafted, this Section clearly contemplates that all threats be covered, including those particularly stressed by NCL -- threats of bodily injury and financial ruin and threats to ruin credit. It also prohibits intimidation -- acts which put undue pressure on a consumer or which call into question a person's intelligence, honesty, reliability, or concern for family. Repeated calls to an individual who has declined to accept an offer may also be an act of intimidation.⁷⁵

The Commission has also added under this Section a prohibition against the use of profane or obscene language. The legislative history of the Telemarketing Act indicates that the Commission should consider prohibiting such abusive practices, and should "draw upon its experience in enforcing standards established under the Fair Debt Collection Practices Act ["FDCPA"], 15 U.S.C. 1692, in defining these terms."⁷⁶ The FDCPA includes a specific prohibition on the use of profane or obscene language,⁷⁷ and the Commission believes such a prohibition is equally appropriate in this Rule.

(b) Courier pickups. The initially proposed Rule prohibited any seller or telemarketer from providing for or directing a courier to pick up payment from a customer.⁷⁸ Law enforcement and consumer representatives generally applauded this

⁷³ IA DOJ at 13; AARP at 14.

⁷⁴ ADC at 1; ARDA at 21.

⁷⁵ NCL at 32-33. Accord, USPS at 11.

⁷⁶ See, e.g., House Report at 8.

⁷⁷ Section 806(2) of the FDCPA, 15 U.S.C. 1692d(2).

⁷⁸ Initially proposed Rule Section 310.4(a)(2).

provision.⁷⁹ IA DOJ noted: "A critical component of a fraudulent telemarketing scheme is getting the victim's money before the victim has the opportunity to reconsider, or before a third party, such as a relative, banker, or law enforcement authority becomes involved."⁸⁰ In addition, NCL stated that over 45% of all telemarketing complaints it receives involve shipment by private courier, and almost all of these shipments contain personal checks. According to NCL, a personal check sent via a private courier is the single most popular method of removing money from the pockets of victims.⁸¹

On the other hand, many industry representatives opposed this provision.⁸² Commenters noted various ways this prohibition would harm legitimate businesses, including: prohibiting C.O.D. transactions;⁸³ preventing newspaper carriers from making door-to-door collections on their paper routes;⁸⁴ eliminating the merchant coupon book industry;⁸⁵ and precluding cable operators and others from using couriers to pick up payments from customers who are in arrears and who wish to avoid disconnection of their service.⁸⁶

After reviewing these comments, the Commission agrees that a ban on the use of courier pickups of consumer payments is unworkable. There is nothing inherently deceptive or abusive about the use of couriers by legitimate business, and the comments show that many legitimate businesses use them. While fraudulent telemarketers often use couriers to obtain quickly the spoils of their deceit, such telemarketers engage in other acts or practices that clearly are deceptive or abusive, and that are prohibited by this Rule. Thus, the prohibition of courier use is unnecessary, and it has been deleted from the revised proposed Rule.

⁷⁹ See, e.g., NAAG at 23-24; USPS at 11-12; CFA at 3; AARP at 14-15.

⁸⁰ IA DOJ at 6.

⁸¹ NCL at 33-35.

⁸² See, e.g., Monex at 13-14; A-Mark at 10.

⁸³ DMA at 25; PMAA at 84; DMSI at 5; MRG at 4; UPS at 2.

⁸⁴ CDI at 1; CA at 3; Cox at 11; Gannet at 6; NAA at 15; Washington at 17.

⁸⁵ AWMI at 1; GGP at 2; GCM at 1; MGC at 1; MP at 1.

⁸⁶ Comcast at 5, n.5.

(c) Credit repair services. Section 310.4(a)(3) of the initially proposed Rule prohibited any seller or telemarketer from requesting or receiving payment of any fee or consideration for goods or services represented to improve a person's credit history, credit record, or credit rating until the contract for the services had expired and the promised results had been achieved.⁸⁷ A number of commenters strongly supported this prohibition as a necessary limitation on the telemarketing of deceptive credit repair services.⁸⁸ The Commission agrees, and is retaining this provision in the revised proposed Rule, with the following two amendments suggested by commenters.

First, NCL suggested, and the Commission agrees, that the prohibition on advance payments should extend to services that promise to remove derogatory information from a consumer's credit record, in addition to those services that simply promise to improve a person's credit history, record or rating.⁸⁹ Second, the revised proposed Rule will not permit, as documentation that the promised results have been achieved, records from the original furnisher or provider of the derogatory information to the consumer reporting agency. As noted by NYSCPB, the original furnisher of such information cannot control the actions of the consumer reporting agencies.⁹⁰ Thus, for a variety of reasons, a consumer's credit report may not be changed, even though the original furnisher has documentation requesting such a change to occur. The Commission, therefore, has revised the initially proposed Rule to require the examination of a consumer's credit report, to determine if the services have been provided, before the seller or telemarketer may request or receive payment from the customer.

A number of commenters suggested amending this Section to clarify that it does not apply to credit monitoring services.⁹¹ The Commission did not intend to limit the actions of such legitimate services, and does not believe this Section would prohibit such services.

Other commenters stated that this provision may inadvertently prohibit the telemarketing of secured credit cards, harming consumers who use such cards to develop a satisfactory

⁸⁷ Revised proposed Rule Section 310.4(a)(2).

⁸⁸ NAAG at 24; CFA at 3; USD at 4; NCL at 37; USPS at 12. ABA "commends" the Commission for this provision. ABA at 9.

⁸⁹ NCL at 38.

⁹⁰ NYSCPB at 8.

⁹¹ ATA at 7; CUCI at 7; DMA at 25; Spiegel at 4.

credit record.⁹² In fact, these commenters suggested an exemption to this provision for the telemarketing of secured credit cards by depository institutions. The Commission does not believe such an exemption is necessary, because banks, savings and loans, and Federal credit unions are outside of the jurisdiction of the FTC, and are therefore not covered by the Rule.⁹³

(d) Recovery room services. The next abusive practice prohibited by the initially proposed Rule involved recovery room scams.⁹⁴ In these operations, a fraudulent telemarketer will call a consumer who has lost money in a previous scam and make false promises that the telemarketer can recover that money, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. As law enforcement commenters noted, the recovery scheme is especially abusive, targeting particularly vulnerable victims, including the elderly.⁹⁵

A number of financial institutions requested clarification that this Section does not apply to legitimate debt collection activities.⁹⁶ In addition, another commenter opined that this Section, as proposed, could impair the ability of newspapers to accept classified ads for lost and found items.⁹⁷ The Commission believes that changing the phrase "induce payment" to "induce purchase" in the definition of "telemarketing" clarifies that debt collection practices are not the types of telemarketing practices at issue in this Rule. Furthermore, the Commission is revising this Section to make it applicable only to recovery services that promise the return of money or other items of value paid for or promised to the consumer in a previous telemarketing transaction. Thus, this Section will not apply to attempts to recover money or items lost outside of telemarketing.

⁹² ABA at 8; Citicorp at 8-9; MasterCard at 11.

⁹³ See 15 U.S.C. 45(a)(2); revised proposed Rule Section 310.1.

⁹⁴ Initially proposed Rule Section 310.4(a)(4); revised proposed Rule Section 310.4(a)(3).

⁹⁵ See, e.g., IA DOJ at 13-15; USPS at 13; NAAG at 24. In fact, NACAA believes there should be an outright prohibition against contacting any consumer to offer these services. NACAA at 4.

⁹⁶ Chase at 4; Chemical at 6; MasterCard at 11.

⁹⁷ Washington at 17.

The initially proposed Rule prohibited sellers or telemarketers from requesting or receiving payment of any fee for recovery services until three days after the recovered money or other item is delivered to the consumer. AARP noted that the three-day period may be insufficient to protect consumers, and asked that the Rule allow the minimum time necessary for out-of-state checks to clear.⁹⁸ The Commission agrees, and has lengthened the time period that must elapse before providers of such services can request payment from consumers to seven business days after delivery of the recovered money or other item of value.

Finally, the initially proposed Rule provided an exemption from this Section for licensed attorneys or licensed private investigators pursuant to a written agreement with the consumer. Some commenters believed that private investigators should not be exempt, because such an exemption would only lead to fraudulent recovery services signing up with unscrupulous private investigators as a method of evading this prohibition.⁹⁹ The Commission agrees, and has removed the exemption for private investigators.

(e) Advance fee loans. Section 310.4(a)(5) of the initially proposed Rule prohibited any seller or telemarketer from requesting or receiving payment of any fee or consideration in advance of obtaining a loan or any credit service when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or credit service for a person.¹⁰⁰ DMA urged that the Commission clarify that this Section does not apply to services, such as monitoring or counseling, that are not represented to improve a person's credit history.¹⁰¹ The Commission did not intend for such services to be covered, and is changing the phrase "credit service," used in the initially proposed Rule, to "extension of

⁹⁸ AARP at 15-16. Fraudulent recovery rooms may use checks, not backed by sufficient funds for them to be paid by the out-of-town banks on which they are drawn, to show consumer victims that the money has been "recovered."

⁹⁹ NAAG at 24; DSA-Nev., Tab B at 8; NCL at 39-40. Both DSA-Nev. and NCL also believed that licensed attorneys should not be exempt from this Section of the Rule. The Commission does not wish to hinder legitimate activities by licensed attorneys to recover funds lost by consumers through fraudulent telemarketing, and thus does not believe this prohibition should be applied to their services.

¹⁰⁰ Revised proposed Rule Section 310.4(a)(4).

¹⁰¹ DMA at 25.

credit." In this manner, the application of this prohibition only to loans or other extensions of credit will be clearer.¹⁰²

(f) Prize distribution. The next prohibited abusive practice included in the initially proposed Rule concerned the distribution of prizes during a prize promotion. Section 310.4(a)(6) of the initially proposed Rule required any seller or telemarketer conducting such promotions to distribute all prizes or purported prizes offered within 18 months of the initial offer to any person. The Commission believes that this practice is adequately covered by the prohibition against misrepresenting any material aspect of a prize promotion in Section 310.3(a)(2)(v) of the revised proposed Rule. Because the practices included in this Section of the initially proposed Rule are addressed by other prohibitions, it has been deleted from the revised proposed Rule.

(g) Reloading. Section 310.4(a)(7) of the initially proposed Rule prohibited any seller or telemarketer from offering or selling goods or services through a telephone solicitation to a person who previously has paid the same seller for goods or services, until all terms and conditions of the initial transaction have been fulfilled, including but not limited to the distribution of all prizes or premiums offered in conjunction with the initial transaction.

This provision of the initially proposed Rule elicited nearly unanimous negative comments from industry representatives. The Commission learned from these comments that many legitimate businesses call their customers before full satisfaction has been made on a prior transaction. Indeed, cultivating established customers in this way is regarded as one of the most effective selling techniques by legitimate sellers. Commenters noted that the Section as proposed would preclude a seller or telemarketer from calling customers to renew subscriptions, warranties, service contracts, and a host of other ongoing services prior to their expiration.¹⁰³ Commenters also noted that this prohibition

¹⁰² Prudential noted that this Section could cover a bank's offer to a consumer of pre-approved loans. The Commission believes that revised Section 310.1 will address Prudential's concerns by clarifying that banks are excluded from coverage of the Rule because they are outside of the Commission's jurisdiction under the FTC Act, 15 U.S.C. 45(a)(2).

¹⁰³ ATA at 7-8; ANA at 14; DMA at 27-28; MPA at 14-15; Cox at 9-10; DMSI at 6; Hearst at 2; MSSC at 20; NAA at 13-14; AMCI at 2 (motor club memberships); CUCI at 8; ASAE at 15-16 (association memberships); GE at 4-6; IBM at 19-22 (computer leases); NCTA at 11-12 (cable services); Viacom at 10-11.

would be particularly burdensome for large, diversified companies with multiple divisions, sales offices and product lines.¹⁰⁴

Given the fact there is nothing about this practice, in and of itself, that is inherently injurious to consumers, and given the widespread use of this practice by legitimate telemarketers, the Commission has dropped from the revised proposed Rule any attempt to restrict this practice. Reloading is a problem when there is deception in the sales offer. Because such deception is prohibited by the revised proposed Rule under Section 310.3(a), a separate prohibition of "reloading" is unnecessary. Accordingly, it has been deleted from the revised proposed Rule.

(h) The Use of Shills. Section 310.4(a)(8) of the initially proposed Rule prohibited identifying a person as a reference for a business venture unless: (1) such person actually purchased the business venture; (2) such person operated that business venture for at least six months, or the seller or telemarketer disclosed the length of time the person operated such business venture; and (3) such person did not receive consideration for any statements made to prospective business venture purchasers. As stated in the discussion of Section 310.2 of the definition of "business venture," the Commission believes that consideration of such a prohibition is more appropriately included as part of its regulatory review of the Franchise Rule.

2. Pattern of Calls.

Section 310.4(b)(1)(i) of the proposed Rule prohibited a seller or telemarketer from making a sales call to a person's residence more than once within any three month period. Many commenters stated that this was an unreasonable and arbitrary prohibition that was difficult to comply with, and that should be eliminated.¹⁰⁵ In addition, commenters noted that consumers already have the protections of the Telephone Consumer Protection Act ["TCPA"] rules, which require telemarketers to establish and maintain a "do not call" list of consumers who do not wish to be contacted by that seller.¹⁰⁶ Given the fact that calls more

¹⁰⁴ ANA at 15; DMA at 27; NRF at 31; AmEx at 1-2.

¹⁰⁵ ATA at 8; APAC at 6; DMA at 28; DSA at 15; MPA at 16-18; NRF at 33; PMAA at 75-77; CUCI at 8; Fingerhut at 25; ADS at 1; AmEx at 1-2; AT&T 20; NCL at 45-46; APAC at 6; AMCI at 1; IBM at 23; ANA at 17.

¹⁰⁶ See, e.g., ANA at 17; Franklin at 1; Olan at 13. The FCC's rules, established pursuant to the TCPA, 47 U.S.C. 227, are codified at 47 CFR 64.1200. The revised proposed Rule includes similar "do not call" protections at Section 310.4(b)(1)(ii), discussed infra.

frequent than once per month are not, in and of themselves, injurious to consumers, and given the consumer protections afforded by the "do not call" requirements of the TCPA¹⁰⁷ and this Rule, the Commission agrees that this provision is unnecessary and has therefore deleted it.

In its place, the Commission proposes in revised Rule Section 310.4(b)(i) to prohibit any seller or telemarketer to cause any telephone to ring, or engage any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Such a prohibition is included in the FDCPA,¹⁰⁸ and the legislative history of the Telemarketing Act states that the Commission should consider the FDCPA in establishing prohibited abusive acts or practices.¹⁰⁹

Section 310.4(b)(1)(ii) of the initially proposed Rule set forth the prohibition on calling a person's residence when that person previously has stated that he or she does not wish to receive such a call made by or on behalf of the seller whose goods or services are being offered. The Commission continues to believe that such a limitation, which is fully consistent with and complementary to similar provisions under the TCPA,¹¹⁰ will effectively implement the Telemarketing Act's directive to include in this Rule "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."¹¹¹ This Section did not elicit many comments; the only change made to this Section responds to the comments suggesting that the prohibition should apply to a particular person or telephone number, not to a residence (as the initially proposed version of this provision stated), because a residence may have more than one person who is a customer of a particular seller.¹¹² The revised proposed Rule states that the

¹⁰⁷ 47 U.S.C. 227.

¹⁰⁸ 15 U.S.C. 1692d(5).

¹⁰⁹ See, e.g., House Report at 8. Moreover, commenters suggested that such a provision would be appropriate. See, e.g., NAA at 20; Cox at 10 (abusive conduct involves multiple calls over a short period of time, such as five calls in a day, or ten calls in a week).

¹¹⁰ See 47 U.S.C. 227; 47 CFR 64.1200(e).

¹¹¹ 15 U.S.C. 6102(a)(3)(A).

¹¹² See, e.g., NRF at 33; Pacesetter at 4.

prohibition applies to calls made to a person, rather than a person's residence.

Section 310.4(b)(2) of the initially proposed Rule provided a limited safe harbor against liability for violating the "do not call" prohibitions included in Section 310.4(b)(1)(ii). This Section stated that a seller or telemarketer will not be liable for such violations once in any calendar year per person called if: (1) it has established and implemented written procedures to comply with the "do not call provisions;" (2) it has trained its personnel in those procedures; (3) the seller, or the telemarketer acting on behalf of the seller, has maintained and recorded lists of persons who may not be contacted; and (4) any subsequent call is the result of administrative error.

Two changes have been made to this Section. First, some commenters suggested that the safe harbor should not be limited to a certain number of violations per consumer or per year.¹¹³ These commenters maintained that if the other enumerated steps are taken by a telemarketer in a reasonable manner, and a call is made erroneously, a Rule violation should not be found. The Commission agrees, and has deleted this limitation to the safe harbor. Second, the safe harbor will apply if the subsequent call is the result of any error, not just an administrative error. This responds to concerns raised that unintentional or accidental calls should also be covered by the safe harbor.¹¹⁴

3. Calling Time Restrictions.

The initially proposed Rule prohibited any telemarketer from calling a person's residence, without the prior consent of the person, at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location. The Commission included this provision in the initially proposed Rule in response to the Telemarketing Act's directive that the Rule should include "restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers."¹¹⁵

¹¹³ See, e.g., IBM at 24; SBTC at 10-11.

¹¹⁴ NRF at 35; PMAA at 83; MSSC at 21. Other commenters suggested that the term "administrative error" was too broad, and that a clear definition should be provided. NACAA at 5; NAAG at 27; USD at 5. The Commission believes that any error should be excused here, as long as the seller or telemarketer is complying in good faith with the other requirements of the safe harbor.

¹¹⁵ 15 U.S.C. 6102(a)(3)(B).

While some commenters suggested different time restrictions,¹¹⁶ the FCC has established these calling time hours in its regulations implementing the TCPA,¹¹⁷ and the Commission has been presented with no compelling reasons to change them. Accordingly, no substantive changes to Section 310.4(c) are proposed.¹¹⁸

4. Required Oral Disclosures

(a) All outbound telephone calls. The Telemarketing Act requires the Commission to include in this Rule the following:

a requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make other such disclosures as the Commission deems appropriate.¹¹⁹

The initially proposed Rule, at Section 310.4(d)(1)(i), implemented this legislative directive by requiring all outbound telephone calls (or telephone solicitations, as they previously were called), to begin with the disclosure of the caller's true first and last name, the seller's name, and a statement that the purpose of the call is to sell goods or services. The divergence between the statutory language and that of the initially proposed Rule elicited significant comment.

Many industry representatives objected to these disclosures being required "at the beginning," rather than "promptly and

¹¹⁶ DSA-Nev Tab B at 11 (7 a.m. to 10 p.m.); Monex at 15 (no restrictions for the precious metals market); NACAA at 5 and GA OCA at 2 (5:00 p.m. to 9:00 p.m. to protect vulnerable older consumers); NAAG at 27 (no calls before noon on Sunday).

¹¹⁷ See 47 CFR 64.1200(e)(1).

¹¹⁸ Certain commenters suggested that the safe harbor provisions of Section 310.4(b)(2) should apply to the calling time restrictions as well as the "do not call" requirements. See, e.g., NRF at 35; ARDA at 31. The Commission believes that the calling time restrictions do not present the administrative compliance difficulties that the "do not call" restrictions impose, and therefore does not believe a safe harbor is necessary here.

¹¹⁹ 15 U.S.C. 6102(a)(3)(C).

clearly."¹²⁰ According to these commenters, requiring disclosures at the beginning disturbs the normal flow of a telephone call,¹²¹ allows no time for a seller to establish, or reestablish, a relationship with the consumer,¹²² infringes on the seller's ability to design and implement effective telemarketing sales presentations,¹²³ and is in effect a "kill message" that will result in most consumers hanging up when they hear the required disclosures.¹²⁴

After considering these comments, the Commission has determined that requiring these disclosures "at the beginning" may be too rigid a standard for achieving the statutory purpose of providing important information to consumers while permitting the use of the telephone in making sales.¹²⁵ The revised proposed Rule adheres to the statutory requirement that the disclosures be prompt and clear. By adhering more closely to the statutory language, the Commission intends to permit some flexibility in the seller's telemarketing presentation. For example, a prompt disclosure would not preclude the seller or telemarketer from establishing some initial rapport with the customer before stating the purpose of the call. However, in "multiple purpose calls," where one purpose is to sell goods or services, the sales purpose must be disclosed promptly.

¹²⁰ ATA at 9; ANA at 21; NRF at 36; DMA at 30; Chemical at 7; CUCI at 9; Gannet at 4; Olan at 16.

¹²¹ See, e.g., NRF at 36.

¹²² See, e.g., ADS at 2.

¹²³ Ann Arbor at 2 (with numerous other newspapers submitting a substantially similar comment).

¹²⁴ See, e.g., Citicorp at 8; Time Warner at 37-38. Not all industry representatives agreed. One telemarketer stated that requiring the disclosures at the beginning is very reasonable. "Rather than impeding business, disclosure of the information proposed by the Commission adds credibility to the legitimacy of the caller and increases consumer confidence [and] responsiveness to its telemarketing calls." TMGI at 2, 4.

¹²⁵ The Senate Report stated that the "prompt" disclosure requirement was added to the Telemarketing Act to address concerns raised by the market research industry (those who conduct surveys and public opinion polls without selling goods or services) that telemarketing calls should not be made under the guise of being calls solely for survey research or similar purposes. See Senate Report at 4.

The requirement that all outbound telephone calls include the disclosure of the caller's true first and last name also elicited significant comment. Commenters noted that "desk names" are commonly used in the industry to protect the safety and privacy of employees, and to protect against potential prejudice or harassment.¹²⁶ Upon reconsideration, the Commission has determined that disclosure of the seller's identity is sufficient. Therefore, disclosure of the caller's identity need not be included in this Rule.

In addition to the disclosure of the identity of the seller and the fact that the purpose of the call is to sell goods or services, Section 310.4(d) of the revised proposed Rule now requires the prompt and clear disclosure of the nature of the goods and services that are the subject of the call. The Commission revised the language of Section 310.4(d) to more accurately reflect language from Section 3(a)(3)(C) of the Telemarketing Act setting forth those additional disclosures.

Section 310.4(d)(1)(ii) of the initially proposed Rule required a number of disclosures in any telephone solicitation that included a charitable solicitation.¹²⁷ Upon careful review of the comments, it is clear that separate treatment of such charitable solicitations is unnecessary. As ATFA suggested at the workshop, the sale of goods or services that includes a representation that a portion of the money paid for such goods or services will go to charity could be treated under the Rule as a sale of goods or services, rather than a charitable solicitation.¹²⁸ As a result, such a sale would be covered under the Rule without having to expressly cover charitable solicitations or donations. Because the initially proposed Rule attempted to encompass these specific types of sales, and given that such sales will be covered under the Rule's definition of "telemarketing," the Commission has decided to delete Section 310.4(d)(1)(ii) from the revised proposed rule.

Additionally, many comments indicated that former Section 310.4(d)(1)(ii) engendered a great deal of confusion on the part of nonprofit entities as to their coverage under the Rule. In

¹²⁶ See, e.g., ANA at 21; Cox at 7-8; APAC at 6; ADS at 2.

¹²⁷ The definition of "goods or services" in Section 310.2(j) of the initially proposed Rule included a statement that the term included "any charitable service promoted in conjunction with an offer of a prize, chance to win a prize, or the opportunity to purchase any other goods or services."

¹²⁸ See Tr. at 188-93 (ATFA).

including former Section 310.4(d)(1)(ii), the Commission did not intend to regulate nonprofit entities.¹²⁹ The Commission is mindful of the limitations on its jurisdiction in this area. Specifically, Section 4 of the FTC Act gives the Commission jurisdiction over corporations that are operated for their own profit or that of their members and over the business aspects of the activities of organizations serving both nonprofit and for-profit purposes.¹³⁰ Federal courts have construed this to bar the Commission from suing any bona fide nonprofit organization under the FTC Act, thereby removing most charitable organizations from the scope of the FTC's authority.¹³¹ Section 6(a) of the Telemarketing Act states that "no activity which is outside the jurisdiction of [the FTC Act] shall be affected by this Act."¹³² Accordingly, as explicitly stated in Section 310.1 of the revised proposed rule, the jurisdictional limitations of Section 4 of the FTC Act, including those regarding nonprofit organizations, will apply to the Telemarketing Sales Rule.

(b) Verification calls. The initially proposed Rule stated that if a caller verifies a telemarketing sale, that caller must repeat certain disclosures.¹³³ Many commenters argued forcefully that this Section was unnecessary and unduly burdensome, requiring duplicative disclosures that would add to the cost of

¹²⁹ See generally ATFA; NFN.

¹³⁰ See American Medical Ass'n v. FTC, 94 F.T.C. 701, 982-93, aff'd, 638 F.2d 443, 448 (2d Cir. 1980), aff'd mem. by equally divided court, 455 U.S. 676 (1982).

¹³¹ This jurisdictional limitation, however, does not prevent the Commission from suing a for-profit company that engages in deceptive practices to solicit charitable contributions from consumers. To this end, the Commission has recently sued several allegedly deceptive "telefunders" -- companies that solicit charitable contributions by telephone -- which allegedly misrepresented the use to which donations would be directed and allegedly misrepresented the value of certain prizes. See FTC v. The Baylis Co., No. 94-0017-S-LMB (D. Idaho 1994); FTC v. NCH, Inc., No. CV-S-94-00138-LDG (LRL) (D. Nev. 1994); FTC v. International Charity Consultants, No. CV-S-94-00195-DWH (LRL) (D. Nev. 1994); FTC v. Heritage Publishing, No. LR-C-94-416 (E.D. Ark. 1994). In addition, the Commission may sue a sham charity that is actually a for-profit enterprise. FTC v. Voices for Freedom, No. 91-1542-A (E.D. Va. July 13, 1992) (consent decree entered).

¹³² 15 U.S.C. 6105(a).

¹³³ Section 310.4(d)(2) of the initially proposed Rule.

the call and annoy potential customers.¹³⁴ In addition, commenters stated that this disclosure would discourage firms from making verification calls, due to increased costs.¹³⁵ After considering these comments, the Commission has determined that requiring duplicative verification disclosures is unnecessary and would unfairly burden legitimate telemarketers. It has therefore deleted this Section from the revised proposed Rule.

(c) Outbound telephone calls that include a prize promotion. The initially proposed Rule required the following three additional oral disclosures for any telemarketing that includes a prize promotion: (1) the fact that no purchase or payment is necessary to win; (2) the verifiable retail sales price of each prize offered, or a statement that the retail sales price of the prize offered is less than \$20.00; and (3) the odds of winning each prize offered.¹³⁶

The comments elicited by these requirements stressed the unnecessary costs that would result from duplicative disclosure requirements.¹³⁷ The Commission wishes to avoid imposing unnecessary requirements for oral disclosures that increase both the length and the cost of calls without a very clear consumer benefit.¹³⁸ Because the benefit to be derived from repeated disclosures of the same information is questionable, the Commission has narrowed the amount of information that must be disclosed orally. Oral disclosures now encompass only information that promises a clear-cut consumer benefit and that is not outweighed by the costs it imposes on legitimate industry. The revised proposed Rule requires a telemarketer making an outbound telephone call which includes a prize promotion to disclose clearly, in addition to the other disclosures required under revised proposed Rule Section 310.4(d), the fact that no purchase is necessary to win.

The Commission believes that this disclosure is so critical to consumer protection in a prize promotion that it should be stated during an outbound telephone call. In addition, the Commission, in response to concerns raised by NAAG, has specified in the revised proposed Rule that this disclosure must be made

¹³⁴ ATA at 9; MPA at 20-21; ARDA at 33; NAA at 19; Spiegel at 5; ALIC at 3; MSSC at 22.

¹³⁵ AT&T at 22-23; MCI at 12; PCH at 4; SBTC at 13.

¹³⁶ Initially proposed Rule Section 310.4(d)(3).

¹³⁷ See generally PMAA, DMA; IMSP.

¹³⁸ See, e.g., MPA at 21-22.